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LOV(H)ERS*: LESBIANS AS INTIMATE PARTNERS AND LESBIAN LEGAL THEORY

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INTRODUCTION

I think that wild love between two women is so totally inconceivable that, to talk or write that in all its dimensions, one almost has to rethink the world, to understand what it is that happens to us. And we can rethink the world only through words. 2

Lesbians, 3 like other humans, express their love in kaleidoscopic ways: sexual and nonsexual, grouped, coupled and solitary, and focus that love on adults, children, 4 animals, plants, and objects. However, when two lesbians embrace the tradition of "romantic love" and begin to perceive themselves—and seek to be perceived—as a "couple," 5 the lesbians are embracing a tradition that histor-

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3. The term "lesbian" throughout this article is used both as a noun and as an adjective, despite recent sociological recommendations that sexual orientation is not the basis of identity and should not be reified into a noun. See, e.g., Risman & Pepper, Sociological Research on Male and Female Homosexuality, 14 Ann. Rev. Soc. 125 (1988) (authors suggest that term "homosexual" more appropriately used as adjective rather than noun). This article employs the pragmatic approach of Cheryl Clarke, who identifies "a woman as a lesbian who says she is." Clarke, Lesbianism: an Act of Resistance, This Bridge Called My Back: Writings By Radical Women of Color (Moraga & Anzaldua eds. 1981).

There are many postmodern definitions of lesbian focusing upon the fragility of the lesbian identity. See, e.g., Stimpson, Afterword: Lesbian Studies in the 1990's, Lesbian Texts and Contexts: Radical Revisions 380 (K. Jay & J. Glasgow eds. 1990) ("Lesbianism' might represent a space in which we shape and reshape our psychosexual identities, in which we are metamorphic creatures."). Such definitions, however, are not useful in the context of legal analysis.

4. This article limits its consideration of lesbians to those without children. For an excellent discussion of the legal status of lesbian mothers, see Polikoff, This Child Does Have Two Mothers, 78 Geo. L. J. 459 (1990).

5. Couple, partner(s), intimate partner(s), and lover(s) will be used synonymously in this work,
cally does not include them. The heritage of "coupledom" is a heterosexual one; its ultimate institution is marriage. In secular societies, the state promotes and protects the institution of marriage by regulating its boundaries and by delineating the rights, responsibilities, and benefits of the individuals participating in the institution.  

Whether or not lesbian or heterosexual couples experience coupledom in similar or dissimilar ways, lesbian couples are relegated to an extra-legal relationship while heterosexual couples may seek state sanction of their relationship. Gay male couples share this extra-legal status, and many observations in this article may be useful in analyzing the consequences of gay male coupledom. Unmarried heterosexuals may also have an extra-legal relationship, whether by choice (perhaps based on political beliefs) or by exclusion (perhaps one of the intimate partners is married to a third person), and many observations in this article may likewise be useful in analyzing the status of unmarried heterosexuals. Nevertheless, the focus of this article is exclusively lesbian and investigates lesbian coupledom from the specific perspective of the development of a lesbian legal theory. 

The development of a lesbian legal theory is not intended as a paradigmatic or prescriptive mechanism, but rather as a way to examine the laws affecting lesbians from both individualistic and communitarian lesbian perspectives. Thus, this article is based on the assumption that lesbian interactions with the legal system affect not only the individual lesbians involved, but also have repercussions for other individual lesbians and for the lesbian community. The inclusion of the lesbian community into the perspective of this work emphasizes the political implications inherent in any interaction between the legal system and lesbians. While an encompassing definition of lesbian community is beyond the scope of this work, it is a widely documented, if not easily definable, phenomenon. 

While lesbians are controlled by laws not of our choosing, we can and must 

perhaps reflecting the often-heard lesbian lament that there is no proper term for participants in lesbian affections. 

The focus on couples does not represent an endorsement or preference of 'pairing' as the most viable form of lesbian relationship.  

6. While the word "coupledom" is awkward, it is used throughout this article to describe not merely the fact of being part of a 'couple' but the ideology of coupling and pairing that permeates heterosexual and lesbian notions of intimate relationships. 

7. See infra notes 101-58 and accompanying text for a discussion of the state's power to regulate the institution of marriage. 


9. The concept of community among lesbians recognizes that individual choices impact and influence others' individual choices. In the legal system, the impact may be formally imposed by a court applying the principle of "stare decisis." 

make choices about how to interact with the law. In order to make informed choices which affect ourselves, our lovers, and our communities, it is necessary to examine the practical and theoretical implications of lesbian coupledom within the patriarchal legal system. This article will make specific judgments about the desirability of particular legal mechanisms from the perspective of developing lesbian legal theory.

The suggestion that legal mechanisms should be or even could be analyzed from a lesbian theoretical vantage point—and thus a lesbian legal theory developed—is disconcerting at first glance for several reasons. Lesbian theory has been developed primarily as it pertains to action and interaction within the lesbian community. Lesbian theorist Joyce Trebilcot suggests principles that may "contribute to the discovery/creation of consciously lesbian realities" and visualizes these principles as applying only to lesbian intra-action:

Where the principles apply. My life is like a muddy lake with some clear pools and rivulets—wimmin's spaces—but many areas thick, in one degree or another with the silts and poisons of patriarchy. The principles I articulate here belong to the clear waters.

Trebilcot, working within the lesbian separatist tradition, nevertheless articulates the other major reason lesbian theory has not been directed at lesbian/non-lesbian interactions—efficacy:

The principles are not intended to be used in situations that are predominantly patriarchal, that is, when getting something from men is at stake, as when one is working in the patriarchy for money, doing business with men and male-identified women, etc. In these contexts I find that it is usually most effective to operate according to patriarchal ideals of knowledge and truth.

This article, however, does not accept the notion that lesbians must necessarily operate according to patriarchal principles within the patriarchal legal context. Rather, this article seeks to delimit the circumference of "patriarchal legal con-
text" by describing the colonization of lesbian relationships by patriarchal legal-

Finally, this article will evaluate the methods lesbians utilize when interacting with the legal system, not to limit lesbian tactics, but to analyze the consequences of those tactics and to begin to develop a lesbian legal theory.

Thus, this article will first consider the implications of the present extra-

legal status of lesbian relationships and the legal remedies currently available to a lesbian couple who find themselves, as a couple, inadvertently involved in the legal system. This article will then focus on a legal institution presently available to lesbians, that of contract, and on a legal institution presently not available to lesbians, that of marriage.

I. CONSEQUENCES AND CURES FOR THE EXTRA-LEGAL STATUS OF LESBIAN COUPLES—POWERS OF ATTORNEY AND WILLS

then there is this obsession held by the overwhelming reality (patriarchy at full gallop in our lives running after us as if on the last hunt, a final assault on our bodies as women-loving women, lesbians, suddenly forced to react, face to face with reality). The confrontation must take place.17

The daily ramifications of the extra-legal status of lesbian couples are decidedly circumstantial. Perhaps the couple discusses unobtainable benefits with regard to income taxes, insurance, or other financial matters; or perhaps the couple discusses immigration status.18 Or—increasingly—perhaps the couple discusses the horrific specter raised by the situation of Sharon Kowalski and Karen Thompson.

Kowalski and Thompson are lesbian lovers who, until November 1983, lived a life not unlike many lesbian couples in the United States.19 Their "life partnership" is described by Karen Thompson "as similar to marriage."20 They had exchanged rings.21 They were buying a house together.22 Their extra-legal "marriage," however, was disturbed by two devastating disasters.

16. We have settled on the metaphor "colonize" because it describes a process by which a disempowered group internalizes the dominant ideas and opinions to such an extent that they become identical to "common sense." See infra note 93 for sources relating to the philosophical and social theoretical analysis of the concept of colonization.

17. N. BROSSARD, supra note 2, at 59.

18. See infra note 104 for a listing of the various ways in which a lesbian couple may be disadvantaged when compared with a married heterosexual couple.


This article adopts the statements by Thompson that the relationship is lesbian, and therefore specifically disapproves of speculations that the relationship is nonlesbian. See, e.g., Recent Developments, Protecting the Nontraditional Couple in Time of Medical Crises, 12 HARV. WOMEN'S L. J. 220, 220 n.3 (1989) [hereinafter Protecting the Nontraditional Couple] ("whether or not Kowalski was engaged in a lesbian partnership remains in dispute").

20. K. THOMPSON, supra note 19, at 25.


22. K. THOMPSON, supra note 19, at 15.
On November 13, 1983, Sharon Kowalski's car was struck by a drunk driver, leaving her with extensive physical and neurologic injuries. In addition, this tragedy precipitated extensive legal proceedings which are still ongoing. Karen Thompson petitioned for guardianship and Sharon Kowalski's parents immediately counter petitioned. The issue in conflict was the relationship between Thompson and Kowalski. Kowalski's parents insisted that either there was no such relationship, or that the existence of such a relationship was detrimental. The lovers were kept apart for three and one-half years, contributing to deterioration in Sharon Kowalski's health and an interruption of her rehabilitation process. The case attracted the attention not only of lesbian and gay activists, but also of feminists and disability activists.

Karen Thompson and Sharon Kowalski were separated and kept apart because their legal relationship was analogous to that of strangers. While Thompson's and Kowalski's particular circumstances might be unusual, they are certainly not unique. Karen Thompson published her book in part to publicize the case "and its ramifications for everyone's rights." In the appendix to her book, Why Can't Sharon Kowalski Come Home?, Thompson advocates the use of legal documentation, such as a durable power of attorney, to insure that lesbian partners can remain involved in the financial and care-related decision-making processes of their partners in case of accident or illness. Thompson is

23. Id. at 1.
24. The injury left Kowalski with limited communication skills, Guardianship of Kowalski, 382 N.W.2d at 862-63, and technically in a coma for months after the accident, THOMPSON, supra note 19, at 21.
25. Thompson relates that she initiated guardianship proceedings after Sharon Kowalski's father reacted negatively to the portrayal of his daughter as a lesbian in a letter written by Thompson to the Kowalskis. K. THOMPSON, supra note 19, at 28. In the letter, Thompson urged the parents to allow Sharon Kowalski to stay in the St. Cloud area for treatment so that Kowalski could remain near Thompson. Id.
26. The attorney for the parents of Sharon Kowalski labeled Thompson's claim that the two women were lovers as "libelous, slanderous and defamatory." K. THOMPSON, supra note 19, at 83.
27. For example, one doctor opined, "I feel that visits by Karen Thompson at this time would expose Sharon Kowalski to a high risk of sexual abuse . . . ." K. THOMPSON, supra note 19, at 163 (quoting letter from William L. Wilson, M.D., to Jack Fena, attorney for parents of Sharon Kowalski).
29. K. THOMPSON, supra note 19, at 161.
30. Thompson and Kowalski were supported by a diverse group of public interest and special interest organizations. These included groups formed expressly for Kowalski, such as local "Free Sharon Kowalski" or "Bring Sharon Home" groups, as well as previously existing groups, such as the Committee for Right to Recovery and Relationships (of Duluth, Mn.), National Organization for Women, Metropolitan Community Church, Handicapped Organized Women, Minnesota Civil Liberties Union, Nursing Home Action Group, United Handicapped Federation, Independent Living Center, Center for the Independence of Disabled (New York) and Lambda Legal Defense and Education Fund. K. THOMPSON, supra note 19, at Acknowledgements.
31. Because Thompson and Kowalski did not openly disclose their relationship to the public or to friends (that is, they were "closeted"), almost no one could step forward to acknowledge the relationship.
32. K. THOMPSON, supra note 19, at 184.
33. Id. at Appendix B.
not alone in suggesting that lesbian and other nontraditional couples make use of durable powers of attorney to protect themselves in times of medical crisis.\textsuperscript{34}

A power of attorney is a document that authorizes one person to act as an attorney in fact for another. Durable powers of attorney, unlike the traditional power of attorney, do not terminate upon incapacity of the principal.\textsuperscript{35} Thus, a durable power of attorney is written authorization to an attorney in fact to perform specified acts on behalf of a principal. A durable power of attorney allows one member of a lesbian couple to appoint her partner\textsuperscript{36} as her attorney in fact, thereby legally authorizing one partner to make certain decisions on the other partner's behalf. These decisions include, but are not limited to: buying and selling real estate and securities or other forms of property; depositing and withdrawing money from checking and savings accounts; pledging the principal's property as security; operating the principal's business; and providing for support and welfare of the principal's dependents. A durable power of attorney for health care authorizes the attorney in fact to consent, refuse, or withdraw consent to any care, treatment, service or procedure on or for the principal, limited only by any restrictions written into the document itself.

Thus, durable powers of attorney may be used to delegate financial decisions, health-related decisions, or both, depending on how the document is drafted and on the applicable state statutes.\textsuperscript{37} Several states specifically mandate separate documents appointing durable powers of attorney for health care and property decisions.\textsuperscript{38} In addition, several books that are directed at lesbians and gay men provide an introduction to the use of durable powers of attorney as well as providing forms, advice, and guidance in making the decision of when and

\textsuperscript{34} For other works that provide a general discussion of the use of durable powers of attorney by nontraditional couples to protect them in times of medical crisis, see, e.g., NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW, § 4.02 (R. Achtenberg, ed. 1989) [hereinafter ACHTENBERG]; H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES: A NOLO PRESS SELF-HELP LAW BOOK § 8 (5th ed. 1989) [hereinafter NOLO GUIDE]; Protecting the Nontraditional Couple, supra note 19, at 229-31; Note, Appointing an Agent to Make Medical Treatment Choices, 84 COLUM. L. REV. 985 (1984) [hereinafter Treatment Choices].

\textsuperscript{35} ACHTENBERG, supra note 34, at § 4.07(2); Protecting the Nontraditional Couple, supra note 19, at 230; Treatment Choices, supra note 34, at 1015.

\textsuperscript{36} While anyone who meets the statutory requirements may be appointed as an attorney in fact, it will be assumed that each intimate partner would seek to appoint the other.

\textsuperscript{37} One commentator states:

The potential scope of the powers of an attorney in fact is typically limited only by the nondelegable acts doctrine. Conceivably, however, in some states the durable power of attorney statute might operate as a screen, limiting the acts that may be performed under a common law agency. In Wyoming for example, a durable power of attorney cannot be used to convey property with a value in excess of $50,000, but a nondurable power of attorney would be valid to make such a conveyance.

Treatment Choices, supra note 34, at 1015.

\textsuperscript{38} Treatment Choices, supra note 34, at 1022 n.231 (citing CAL. CIV. CODE §§ 2430-2444 (West Supp. 1990) (sets forth right to appoint durable power of attorney for health care decisions); DEL. CODE ANN. tit. 16 §§ 2501-2508 (1983) (right to appoint agent in connection with treatment termination decisions); VA. CODE § 54.1-2981-2992 (1988) (right to make written declaration instructing physician to withhold life-prolonging treatment)).
how to draft such documents. Finally, specific state statutes often provide forms for powers of attorney in the text of the legislation.

A durable power of attorney, however, is not always an available option. Some states limit who can be appointed as the attorney in fact in ways that would certainly exclude lesbian partners, or might possibly exclude lesbian partners in particular situations. Further, a state may "limit the scope and authority of the attorney in fact."

Even when a durable power of attorney is available statutorily, it may be attacked by a homophobic family in much the same way as a will may be attacked. Family members might litigate specific decisions of an attorney in fact as contrary to the best interests of the dependent. Hostile relatives may also attempt to subvert the attorney in fact's authority by seeking to have a guardian named who is different from the person appointed by the durable power of attorney. In some states, the appointment of a guardian by the court automatically terminates a durable power of attorney. It has been noted, however, that:

a court has [a] duty to uphold the patient's constitutional and common law interests in determining the course of [her] own medical care. The patient's choice of an agent is an aspect of [her] choice of treatment, and the clear trend of recent court decisions has been to respect past competent expressions of treatment preference.

From the perspective of lesbian legal theory, it is important to note that the purpose of a durable power of attorney is to insulate a lesbian couple from legal rules which would otherwise be applicable in times of incapacity. Once in place, a third party cannot use a durable power of attorney to force the attorney in fact to act or not to act in a certain way. Further, a durable power of attorney can be

39. See supra note 34 for a list of sources that provide guidance on the drafting and use of durable powers of attorney.
40. See, e.g., CAL. CIV. CODE § 2450 (West Supp. 1990) (form of power of attorney); CAL. CIV. CODE § 2433 (form of warning to be appended to durable power of attorney in case of no legal counsel); N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 1989) (statutory short form of general power of attorney).
41. See, e.g., Fla. Stat. Ann. § 709.08 (West Supp. 1990) (limits attorney in fact to "spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity . . . ").
42. See, e.g., CAL. CIV. CODE § 2432.5 (excludes employees of treating health care facility from being named attorney in fact to make health care decisions unless "the employee so designated is a relative of the principal by blood, marriage, or adoption").
43. NOLO GUIDE, supra note 34, at § 8:10; Treatment Choices, supra note 34, at 1012 n.175.
44. See infra notes 54-62 and accompanying text for a discussion of the ways that a will might be attacked by a homosexual family.
45. Treatment Choices, supra note 34, at 1006.
46. Id. at 1027.
48. Treatment Choices, supra note 34, at 1028.
limited and tailored in its scope and authority by careful drafting. Absent statutory requirements that limit the persons who can serve as attorneys in fact (e.g., blood relatives), a durable power of attorney or other power of attorney need not denominate the relationship between the parties. A recitation of the loving nature of the relationship, however, might be appropriate in a power of attorney if the parties suspect that the nature of the relationship would be denied by hostile third parties. In Kowalski's case, a durable power of attorney would have provided a document subverting the "natural right" of Sharon Kowalski's parents over their adult daughter. A recitation of the relationship in a document signed by Sharon Kowalski could have prevented people from reacting to Thompson's disclosure as if Thompson were a "sick crazy person who has made up this whole story." The preparation of the document or the disclosure of lesbianism within it, however, still leaves open the possibility that the relationship will be attacked as "sick."  

Powers of attorney, durable or otherwise, do not survive the death of a party. In order to provide protection and recognition to a surviving lover, a lesbian must execute a will, a trust, or some other testamentary document. Testamentary documents, like powers of attorney, are individualistic and adaptable documents which may displace the laws which otherwise nullify the lesbian relationship in favor of legally recognized relationships.

When a person dies without a will, the estate is distributed according to the intestate succession laws of the resident state. While these statutes may vary from state to state, "in all cases the heirs are limited to the legal spouse and blood relatives of the decedent, and in some states, the relatives of a predeceased legal spouse." In order for a lesbian to bequeath anything to her partner or to anyone outside her legally defined family, she must execute a will or trust. It is well established that "[a]bsent a written instrument which is properly executed by a person of the requisite capacity, the law gives no rights to persons unrelated by kinship or legal marriage in matters concerning disposition of assets on death." Alice B. Toklas, who the Stein family left virtually penniless after the death of her lover Gertrude Stein, is an infamous example of a lesbian partner who was left unprotected from the hostile family of a deceased lover.

Even a perfectly executed testamentary document is subject to legal attack

49. K. THOMPSON, supra note 19, at 26 (reaction of Sharon Kowalski's parents as related by their other daughter to Thompson after Thompson disclosed nature of her relationship with Sharon).

50. See supra note 27 for an example of how a medical doctor characterized a continued relationship between Thompson and Kowalski as potentially detrimental to Kowalski.

51. ACHTENBERG, supra note 34, at § 4.04.

52. Id. at § 4.02.

from disinherited relatives. Grounds for contest are generally limited to mental incapacity, fraud, duress, and undue influence.\textsuperscript{54} Hostile family members would most likely challenge a will that bequeaths the bulk of an estate to a lesbian lover on the ground of undue influence. To mount a successful challenge on these grounds, a contestant must prove that the beneficiary exerted enough pressure on the testator to destroy her free will.\textsuperscript{55} Intervivos trusts are subject to similar attacks.\textsuperscript{56}

In judging will contests, the probate court, as a court of equity, has broad powers. Thus, judges have wide latitude to implement their particular versions of fairness, despite strong precedent limiting the disruption of “testamentary disposition merely because it does not conform to their notions of fairness or propriety.”\textsuperscript{57} This notion of preserving “testamentary disposition” or testamentary intent is the cornerstone of probate law. A lesbian relationship alone is not sufficient reason to disturb testamentary intent.\textsuperscript{58} Courts that have addressed undue influence in the context of homosexual relationships, “look for evidence in the relationship of the testator and beneficiary tending to show the beneficiary’s control over the testator was sufficiently strong that the free will of the testator was supplanted as a result.”\textsuperscript{59} While one commentator recently noted the impact of judicial homophobia and concluded that “a homosexual testator who bequeaths the bulk of his [sic] estate to his lover stands in greater risk of having his testamentary plans overturned than does a [similarly situated] heterosexual testator,”\textsuperscript{60} contemporary judicial discourse indicates a more tolerant attitude.\textsuperscript{61}

\textsuperscript{54} Achtenberg, supra note 34, at § 4.04[8].


\textsuperscript{56} Sherman, supra note 55, at 265-66. See also Knowles v. Binford, 268 Md. 2, 298 A.2d. 862 (1973) (trust benefiting women's partner overturned as product of undue influence, not affection).

\textsuperscript{57} Sherman, supra note 55, at 228.

\textsuperscript{58} The “fact that one's beneficiary, agent or nominated conservator is also one's homosexual lover is not a basis, in and of itself, for invalidating otherwise valid estate planning documents.” Achtenberg, supra note 34, at § 4.02. See also Bowe & Parker, PAGE ON WILLS § 29.92 (1961).

\textsuperscript{59} Achtenberg, supra note 34, at § 4.04[8].

\textsuperscript{60} Sherman, supra note 55, at 267.

\textsuperscript{61} Three cases, all involving gay men, all concerning nonexistent or imperfect testamentary documents, and all decided in traditionally conservative jurisdictions, are exemplars. In each case, the court noted the homosexual nature of the relationship between the men and decided in favor of the surviving lover.

In Weekes v. Gay, 243 Ga. 784, 256 S.E.2d 901 (1979), the court noted only that “the appellee and decedent had lived together for six years in a homosexual relationship.” Id. at 784, 256 S.E.2d at 903. The court nevertheless imposed an implied trust to grant the home to the gay male lover despite the fact that the deceased died intestate. Id. at 787, 256 S.E.2d at 904.

In Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980), the court cited Weekes with approval, found the confidential relationship necessary to support a constructive trust, and stated that “whether or not a confidential relationship exists depends upon the actual relationship between the parties.” Id. at 464, 597 S.W.2d at 84. The court opined that “all homosexual involvements are not as a matter of law confidential relationships sufficient to support a constructive trust, but a court of equity should not deny relief to a person merely because he is a homosexual.” Id. at 465, 597 S.W.2d at 85. In finding a confidential relationship, the court pointed to the fact that the two men had been lovers for over a year and had lived together for much of that time. Id. at 464, 597 S.W.2d at 84.

In Succession of Bacot, 502 So. 2d 1118, 1120 (La. Ct. App. 1987), the court upheld a ho-
However, in addition to relying on the overdue expansion of probate judges' sensibilities in the area of lesbian estate dispositions, there are technical safeguards that can improve the chances of a contested instrument to withstand attack. In the case of testamentary dispositions, as in the case of powers of attorneys, the more legally sound the document, the more efficacious it will be.

Efficacy, however, is not the ultimate interest of a developing lesbian legal theory. While short term practical benefits for specific lesbians are important, this interest should not eclipse a more general notion of lesbian empowerment. The relationship between efficacy—the realization of practical effects—and politics—the imagination of possible empowerment—is complicated. The difficulty is best expressed by lesbian theorist Audre Lorde:

Those of us who stand outside the circle of this society’s definition of acceptable women; those of us who have been forged in the crucibles of difference—those of us who are poor, who are lesbians, who are Black, who are older—know that survival is not an academic skill. It is learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master’s house as their only source of support.

Durable powers of attorney, wills, and similar documents are essentially “tools” that may provide a measure of protection to the members of lesbian couples who are attacked by outside parties such as family, recalcitrant health care workers, and bureaucrats. Depending on how such documents are written, they can both protect the individual wishes of lesbians or lesbian couples and force the legal system to recognize and acknowledge lesbian relationships without allowing the system to define those relationships. Additionally, these “tools” are outer-directed, protecting lesbians by preventing the laws that would otherwise govern from taking effect. Because of this limited, outer-directed impact, these instruments belong to the class of “tools” Lorde describes as providing ephemeral or temporary relief. This restricted effect, however, does not in and of itself render these instruments objectionable from a lesbian theoretical

logographic will of a gay male which read “I leave all to Danny.” The Court considered evidence of the nine year relationship between the decedent and his partner which satisfied the Louisiana requirement that in the case of ambiguity the legacy be decreed to the legatee most intimately connected to the decedent. Id. at 1123-24.

62. These techniques include, but are not limited to, the use of an attorney familiar with the problems facing lesbian testators, the preparation of detailed memoranda of the execution ceremony, video taping of the execution, insertion of ad terrem clauses, clarification of the intent of the testator or settlor in the documents to the point of redundancy, and the insertion of explicit disinheritance clauses. ACHTENBERG, supra note 34, at § 4.04[1]-[8]. See NOLO GUIDE, supra note 34, at § 9:4-9:19 (sets forth technical safeguards to protect testamentary intent of deceased); Protecting the Nontraditional Couple, supra note 19, at 234 nn.85-86 (same).

63. A. LORDE, supra note 12, at 112 (emphasis supplied).
perspective. Employing such "tools" can provide immense benefits to individual lesbians and lesbian couples. Nevertheless, such employment should not be confused with genuine change. Documents such as durable powers of attorney, wills, trusts, and the designation of beneficiaries provide practical protection for lesbian couples and limit the opportunity for nonlesbians to define lesbian relationships. But such "tools" are not intended to internally define the lesbian relationship. Such an internal definition, as in the case of contracts, poses a different problem from a lesbian legal perspective.

II. Contracts

patience and ardour we must constantly renew in order to make it across the opaque city of the fathers, always on a tight-rope, having to keep our balance, and all sides, the abyss. For we work without nets.\(^{64}\)

A myriad of advisors to lesbian couples encourage the use of cohabitation contracts: ones that are either meant to be specifically legally enforceable or ones that are written as an expression of commitment.\(^{65}\) Depending on the type of contract, the jurisdiction, and the court, agreements between lesbians may have to be expressly written,\(^{66}\) expressly oral,\(^{67}\) or be im-

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64. N. BROSSARD, supra note 2, at 57.
65. See ACHTENBERG, supra note 34, at § 2.02 (cohabitation agreements should always be in writing, whether or not required by law, in order to express parties' intentions); D. CLUNIS & G. GREEN, LESBIAN COUPLES 65 (1988) (contracts acknowledge daily living issues such as money, sharing expenses, and future expectations and obligations); Engelhardt & Triantafillou, Mediation for Lesbians, in LESBIAN PSYCHOLOGIES 327, 339 (Boston Lesbian Psychologies Collective ed. 1988) (describes draftings of contracts from perspectives of lawyer and therapist); NOLO GUIDE, supra note 34, at § 2:1-2:9 (recent changes in law allow unmarried couples to make contracts regarding property rights, helps avoid costly and traumatic litigation); OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK 217 (G. Vida ed. 1978) (lesbian partners must make two contracts: one dealing with financial and property arrangements and one dealing with personal matters) [hereinafter OUR RIGHT]; C. WEST, A LESBIAN LOVE ADVISOR: THE SWEET AND SAVORY ARTS OF LESBIAN COURTSHIP 104-05 (1989) (lesbian couples should write "love and partnership accords") [hereinafter LOVE ADVISOR].

66. In an unpublished decision, Richardson v. Conley, a superior court followed Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), and recognized that a lesbian relationship was sufficiently legitimate to require one party to pay support at the end of the relationship. The decision was based in part on the existence of a signed agreement apportioning responsibility for household and financial support between them. Note, Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors, 14 HASTINGS CONST. L. Q. 137 n.159 (1986). Both ACHTENBERG, supra note 34, and the authors of NOLO GUIDE, supra note 34, urge lesbians who want their contracts to be legally enforceable to put them in writing. Both works provide sample contracts and guidelines for preparation, and contain advice about the proper scope of such documents, the meretricious service pitfalls, the necessity for attorney preparation, and other important aspects of contract preparation. Anyone interested in the nuts and bolts of cohabitation contracts for lesbians is encouraged to seek out either of these two works.

67. In Friedlander v. Solari, N.Y.L.J., Jan. 14, 1988, at 14, col. 2, a New York court enforced an express oral agreement between two women who had lived together from 1969 to 1984. The defendant moved for summary judgment to dismiss the complaint on several grounds, one of which was failure to set forth a legal theory on which relief could be granted. In finding for the plaintiff, the court stated "[a]n implied contract to pay for services rendered between two people who have
plied to be legally enforceable. Some agreements may not be legally enforceable at all. Because of a judge's power to find an implied contract—even if the couple has not expressly documented their promises and agreements—contract principles may enter a lesbian relationship unexpectedly. In jurisdictions that follow Marvin v. Marvin and effectuate the "intent" of the parties, "conduct may give rise to an implied contract completely at odds with the intent of one or more of the parties; or unanticipated equitable relief may be granted contrary to expectation. Thus, both parties may be surprised by the consequences of verbal statements and nonverbal acts." While "most state courts actually faced with the question of living-together contracts have enforced written ones, rejected implied ones, and fallen somewhere below the middle with oral ones," it is readily apparent that contract law is having an impact on lesbian relationships.

Litigation based on some form of contract may be the only recourse available to a woman forced to protect property interests during the dissolution of a lesbian partnership. Although preplanning with other documents, such as joint tenancies or tenancies in common and dual titling of property, can supplant lived together is unenforceable. However, an express oral agreement for payment may be enforced." Id.

68. See, e.g., Small v. Harper, 638 S.W.2d 24 (Tex. Ct. App. 1982). In this appeal from a summary judgment, the court reversed the entry of judgment. Id. at 30. Although the court used the terms "an oral partnership" and "partnership," it is unclear from the portions of the depositions appearing in the decision whether the two women had actually orally agreed to a myriad of financial details or whether the court was implying a contract. The court found the nature of the relationship relevant, emphasizing the following deposition testimony of the plaintiff:

I had always viewed our relationship just as a marriage, as both of us had. We both used that word many times.

....

Q: You have said in your pleadings that the two of you formed a partnership for profit. When did that take place?

A: A partnership for profit I presume would refer to the fact that we agreed that we would live together, and that we would accumulate together; and always the goal at the end was a comfortable retirement, and we were always talking about details of that.

Id. at 26 (emphasis supplied).

69. See NOLO GUIDE, supra note 34, at § 2:3. ("Two states (Georgia and Illinois) outlaw contracts between any unmarried couples.")

70. See Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Michelle Treolla Marvin sued actor Lee Marvin for breach of contract when the couple separated after living together for seven years. It was Michelle Marvin's position that Lee Marvin had expressly promised to support her financially if she gave up her career and took responsibility for the household. Id. at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819. The court found a cause of action for breach of contract and further determined that implied contracts, implied partnerships, quantum meruit, and constructive trusts can be used as a basis for granting relief where the situation warrants. Id. at 675, 689, 557 P.2d at 116, 122, 134 Cal. Rptr. at 825, 831. See also ACHTENBERG, supra note 34, at § 3.04[2][a][i]:

The court set forth the standard that the reasonable expectations of the parties are primary. The court states 'that the parties intend to deal fairly with each other' and that 'the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.'

Id.


72. ACHTENBERG, supra note 34, at § 2.02.

73. NOLO GUIDE, supra note 34, at § 2:6.
much of the need for contracts, not all types of property can be titled. For other properties and for intangibles, the question of contract is still relevant.

Given the possibility that a relationship contract might be implied from words or conduct and that litigation might occur, the most practical course of conduct for an individual lesbian might be to consciously and deliberately negotiate an enforceable written agreement. Such an agreement would be advantageous from the couple's perspective because it could both address specific concerns and provide for alternative dispute resolutions. However, even though a deliberated document may serve the parties better than proceeding through the litigation process, the contract form itself may be inherently unsuited for use in formalizing the terms of a lesbian relationship.

In order to address relationship contracts in the context of the development of a lesbian legal theory, it is necessary to make a critical examination of contract ideology. Classical contract theory flows from the fiction of the original contract in which the inhabitants of the state of nature exchanged the "insecurities of natural freedom for equal, civil freedom which is protected by the state." Contracts create "rights" between the contracting parties, enforceable by recourse to legal mechanisms. Critics of classical contract theory claim that "the major function of contract law is . . . [to] legitimate[ ] privilege through the creation of neutral sounding apolitical 'rights.'" Privilege is maintained by two basic myths, that of equality between those contracting and that of freedom to choose to contract. These myths mask the imbalance of power between contracting parties by legally describing it "as a relationship between formally equal contracting parties" no matter the actual economic or social positions between the two. While there are principles within applied contract theory that subvert this myth—such as unconscionability—the main tenet of contract theory is a formalism that renders underlying conditions irrelevant if the formal requirements of contract are satisfied.

The claim that contract ideology obscures—and thus perpetuates—disparities in social and economic power is relevant for the development of lesbian legal theory, especially as the theory recognizes the diversity of lesbians. The contract solution may obscure real social, economic, physical, and emotional differences

74. Preplanning through these mechanisms has been especially effective in the area of real estate and for titled property such as automobiles, boats, mobile homes, bank accounts, and stocks and bonds.


76. West, Pornography as a Legal Text, in For Adult Users Only: The Dilemma of Violent Pornography 114 (Gubar & Hoff eds. 1989) (discussing Critical Legal Studies).


78. West, supra note 76, at 115. In addition, the myth of freedom to contract conceals that one of the parties may be coerced by circumstance into "consenting" to the contract. "According to contemporary contract theorists, social conditions are such that it is always reasonable for individuals to exercise their freedom and enter into the marriage contract or an employment contract or even . . . a (civil) slave contract." C. Pateman, supra note 75, at 7. This article assumes that the lesbian intimate relationship addressed is based on choice.
between lesbians, which are manifested in complex and contradictory ways. It is not only patriarchal culture that exhibits an attraction for the myth of equality; the myth pervades lesbian culture as well. Further, the myth of equality may never be more powerful than at the inception of coupledom, the very time at which a relationship contract would be drafted. Thus, from a pragmatic perspective, the contract solution is flawed because it depends on the existence of real, perceived, continuing, and absolute parity. The virtual nonexistence of absolute parity between any two lesbians makes contract questionable from a lesbian theoretical perspective.

Nevertheless, to the extent that the contract process confronts and addresses the lack of parity, the contract solution may be useful, especially from the perspective of the historically "disadvantaged."

79. One of many examples of the differences between lesbians is the diversity of their class background and present class situation. Lesbian writer Chrystos recounts her own experience within the context of overclass and underclass lesbian intimate partnerships thusly:

In breakups with over class women, money has often been the most bitter battle and I have given in to ridiculous demands . . . . This bitterness about money and arguments I've had with lovers over things (things I had brought into the relationships—curiously I have more "things" than most middle class women who don't own houses, probably because I never part with anything, another under class value) shames me deeply . . . . These are the raw nerves under our mistrust of one another. The ex-lover has an uncle who owns a bank . . . . None of my relatives even work in a bank . . . . When I try to fight about money with over class lovers I've already lost and I know it. I can't be casual although I envy those who can be.

Chrystos, Headaches and Ruminations, 17 Gay Community News 9, February 4-10, 1990.

Similarly, another lesbian theorist explains: nonprivileged dykes are sometimes unable, and usually unwilling, to state their emotional needs. We are therefore (conveniently, I can't resist noting) assumed to have none. So, those accustomed to asking for things, do so; those who are unaccustomed to asking for things don't. And the class system marches on.

Cardea, Lesbian Revolution and the 50 Minute Hour, in Lesbian Philosophies and Cultures, supra note 12, at 193, 209-10.

For nonlesbian perspectives on how different cultural attitudes affect contract, see Wagatsuma & Rosett, Cultural Attitudes Towards Contract Law: Japan and the United States Compared, 2 UCLA PAC. BASIN L.J. 76, 91 (1983) (discusses Japanese notion of "wa" (group harmony) and affect on actions of disputing parties who act as if there is no dispute); Mahoney, Contract and Neighbourly Exchange Among the Birwa of Botswana, 21 J. AFRICAN L. 40, 63-65 (1977) (discusses apparently unusual practice of enforceable executory contracts among tribal members (applied in plowing context only)).

80. See generally D. CLUNIS & C. GREEN, supra note 65, at 14-17 (describing concepts of "merging" and "fusion" that typify "romance" stage of lesbian relationships).

81. See Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (provides example of different implications of contract in terms of historic advantage not in context of relationship contracts). Patricia Williams describes the disparate strategies employed by herself, a black female law professor, and Peter Gabel, a white male law professor and one of the founders of the Critical Legal Studies movement. Although both wanted to "enhance trust," Gabel rented an apartment with cash and no written documents, while Williams signed "a detailed lengthily-negotiated, finely printed lease." Id. at 406-07. Williams explains the contrast:

I grew up in a neighborhood where landlords would not sign leases with their poor, black tenants, and demanded that rent be paid in cash; although superficially resembling Peter's
Property Acts improved the status of certain women by allowing them to participate in contracts,\textsuperscript{82} the ability to contract can empower specific lesbians. In all cases, however, lesbian legal theory must confront the limitations and dangers of contract ideology.

The dangers—if not the limitations—of contract theory are especially pronounced when contract is used to organize nonlegal aspects of lesbian relationships. The link between legal and extra-legal perspectives is often brought to the forefront when lesbian couples write two contracts, one legally enforceable and one a separate emotional document.\textsuperscript{83} The emotional document, despite the intent of the parties, can become a litigated contract.\textsuperscript{84} Yet, even absent the risk of unintended enforcement, the appropriateness of the concept of coupledom through contract—a concept pervasive in lesbian literature—is questionable.

Many lesbian advisors advocate applying contract principles to all aspects of life. For example, in \textit{Our Right to Love: A Lesbian Resource Book}, the writers in the portion entitled “Legal Planning for Loving Partnerships” claim that “we all operate within our relationships on a contract.”\textsuperscript{85} Pat Califia, in a classic book on lesbian sexuality stressing pluralism and nonconformity, nevertheless suggests “when you form a relationship with another woman or other women, think of the process as negotiating a contract rather than enforcing standards or issuing ultimatums.”\textsuperscript{86} And in a book described by the publisher as “the first definitive guide for lesbians that deals with the pleasures and challenges of being

\begin{quote}
transaction, such “informality” in most white-on-black situations signals distrust, not trust
\end{quote}

Peter, I would speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the denigration of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, with which I may feed and clothe and shelter myself, by which I may be seen as equal—even if I am stranger. For me, stranger-stranger relations are better than stranger-chattel.

\textit{Id.} at 408 (emphasis supplied).

\textsuperscript{82} There is an historic prohibition and regulation of women’s right to contract. The Married Women's Property Acts, which provided married women with the right to contract were enacted over a period of time between 1839 and 1882. \textit{See generally}, Weitzman, \textit{Legal Regulation of Marriage: Tradition and Change}, 62 CALIF. L. REV. 1169, 1172 (1974) (discusses effect of Married Women's Property Acts) (citing L. Kanowitz, \textit{Women and the Law: The Unfinished Revolution} 40 (1969)).

\textsuperscript{83} Achtenberg, supra note 34, at \textsuperscript{2} 2.04(2); Nolo Guide, supra note 34, at \textsuperscript{3} 3.5; Our Right, supra note 65, at 217; Love Advisor, supra note 65, at 105.

\textsuperscript{84} See supra notes 70-74 and accompanying text for a discussion of the potential of courts to enforce implied contracts that do not necessarily reflect the parties' true intent.

\textsuperscript{85} Our Right, supra note 65, at 217.

\textsuperscript{86} P. Califia, Sapphistry: The Book of Lesbian Sexuality 57 (1980).
part of a couple," the authors promise that: contracts can acknowledge day to day living issues and the depth and richness in a relationship while at the same time providing guidelines for the "what ifs" every couple faces. Once done, these guidelines can contribute to the glue we've talked about as they provide a sense of structure and commitment.

While scrupulously avoiding the term "contract," the author of A Lesbian Love Advisor emphasizes the importance of drawing up "love and partnership accords" that cover topics such as division of income and property, ownership of major property, division of household services, maintenance and expenses, sexual fidelity, quality of life considerations, children, disputes, and possible break-up. The author argues that "written words of personal commitment can preserve goodwill and friendship, even sanity" during relationships, and then specifies that the "accords" are "enforceable not in a court of law, [but] only in a court of love." The enforcement of drafted accords in "a court of love" and similar metaphors are troublesome from a lesbian theoretical perspective: "Contract is far from being opposed to patriarchy; contract is the means through which modern patriarchy is constituted." Further, social contract theory concerns "the maintenance of existing power structures, replacing religious justification and the 'divine right,'" If contract theory does perpetuate and legitimize the existing power structure—to the detriment of other potentially legitimate constructs—rooting lesbian relationships in a social contract system will never lead to lesbian empowerment.

Not only might the re-enactment of contract theory within lesbian relationships perpetuate patriarchy, but such use may obfuscate the aspirations of lesbian relationships. The dominant ideology of contract theory "colonizes" lesbian aspirations; contract "makes sense" and disallows other ways of thinking. Thus, the aspirations of lesbian relations become inexpressible because contract is the available ideology of expression.

One attempt to dislodge contract ideology's application to the lesbian rela-

87. Press release for Clunis & Green, supra note 65 (on file with authors).
88. D. Clunis & C. Green, supra note 65, at 65-66.
In the subchapter entitled "Contracts," the authors support their suggestion that couples make contracts by claiming:
[there are a lot of practical details involved in sharing one's life with a partner. To act as if love is all we need is to ignore some practical realities. And it misses a wonderful opportunity to create an agreement and contract that celebrates the specialness of the relationship.
Id. at 65.
89. Love Advisor, supra note 65, at 104-06.
90. Id. at 105.
91. C. Pateman, supra note 75, at 2.
92. S. Hoagland, supra note 12, at 73.
tionship entails an examination of the contractual requirement of consideration, exchange, and *quid pro quo*. While nonlesbians have claimed that life is "an endless series of discrete contracts," and lesbians have claimed that "we all operate within our relationships on a contract," contract ideology is similar to what lesbian theorist Sarah Hoagland describes as a mercantile culture:

We talk of our investment in a relationship, of investing time and energy in each other, of negotiating differences; we want to make sure we get our fair share in return for what we give, that we get our needs met, and we often regard the relationship itself as an investment. Indeed, such mercantile considerations have replaced our caring in many instances.

Yet responding to each other need not be an exchange of debts and credits. If we regard our connections as essentially a matter of negotiating competing needs and wants and of sacrificing ourselves for the other or of maintaining our interest at her expense, then we will begin to take each other for granted or we will be trying to control each other.

Hoagland rejects the belief that obligation is the foundation on which lesbians should build their relationships: "What we get from connecting with another is not a series of bargains in return for a few compromises. What we get from connecting with another is the connection."

If, as Hoagland suggests, lesbian theory disputes the power of patriarchal claims such as mercantilism on a social level, then lesbian legal theory must also examine such claims on the legal level. The development of a lesbian legal theory must not only define law, but must delimit law within lesbianism. The casual acceptance of patriarchal contract theory as the method of organizing lesbian relationships undermines the development of a specifically lesbian existence or theory. The habitual employment of contract documents and metaphors to order lesbian relationships imports the considerable power of the patriarchal state into lesbian existence.

One solution to the conflict between contract theory and lesbian legal theory is to advocate complete abandonment of contracts between lesbians. This solution, however, ignores the very real advantages contract can provide in specific instances, as well as dishonors the equally real empowerment that the ability to contract can provide for previously disempowered lesbians. A better solution is to limit relationship contracts to intended legal documents that address legal aspects of the relationship. Further, before drafting these legal documents, each party should consider that contract has a dual meaning: not only may it serve as a factual, evidentiary device, but it may also inadvertently express a lesbian's own unique history. Finally, when negotiating such contracts,

94. See generally J. Calamari & J. Perillo, Contracts, §§ 4-3 - 4-15 (3d ed. 1987) (chapter on consideration discusses exchange and *quid pro quo* as essential elements of contract.)

95. C. Pateman, supra note 75, at 15 (refers to persons who adopt contract theory as "contemporary contractarians").

96. Our Right, supra note 65, at 217.

97. S. Hoagland, supra note 12, at 274.

98. Id. at 275.
each party should seriously discuss and confront the contract myths of equality and freedom and how these myths operate in their particular situation. The goal of lesbian legal theory must always be for lesbians to use contract rather than be used by it.

III. STATE SANCTIONS: MARRIAGE, QUASI-MARRIAGE, AND ADOPTION

The difference is that I cannot live deferred. A stay of transformation, the synthesis of the same singular women. And it's this difference I ask of your body, the difference of other women with my regard. Identical to yours.99

The ultimate institution of coupledom is the state-sanctioned contract of marriage. Marriage differs from other contracts in a variety of ways:

The marriage contract is unlike most contracts: its provisions are unwritten, its penalties are unspecified, and the terms of the contract are typically unknown to the “contracting” parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms. In fact one wonders how many men and women would agree to the marriage contract if they were given the opportunity to read it and to consider the rights and obligations to which they were committing themselves.100

The state promotes this ignorant contracting between heterosexual lovers labeled marriage as foundational for society101 as well as for individual happiness.102 The state's interest in marriage is evidenced by the state's scrupulous

99. N. BROSSARD, supra note 2, at 51.
100. Weitzman, supra note 82, at 1170.
101. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965), in which the Court stated: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life . . . .” See also Maynard v. Hill, 125 U.S. 190, 211 (1888) (Court found marriage is “the foundation of the family and society, without which there would be neither civilization nor progress”).

Other legal scholars have attempted to delineate just how marriage goes about its lofty business of promoting civilization and progress. One commentator stated:

The marriage relationship promotes . . . certain individual and community values. It is perhaps impossible to list all the values promoted by the marriage relationship, but five such values come readily to mind: (1) generosity or the spirit of sacrificial giving; (2) fidelity or the honoring of commitments; (3) integrity or the creation of trust; (4) self-respect or the assurances of personal worth; (5) sustained joy. These individual values acquire added significance for society because individual and community values are interrelated . . . .

Society benefits from a process of value infusion whereby those individual values nurtured into the marriage relationship are transmitted to the broader community.

Buchanan, Same-Sex Marriage: The Linchpin Issue, 10 U. DAYTON L. REV. 541, 542 n.8 (1985). See also Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 MICH. L. REV. 463, 472 (1983) (values produced and promoted by the marriage relationship are related to political ends of democracy, because “it is primarily through family bonds that both children and parents learn attitudes and skills that sustain an open society”).

102. There are substantial psychological and social benefits arising from the “sense of worth that comes with acceptance by the community.” Ingram, A Constitutional Critique of Restrictions on The Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?, 10 J.
patrolling of the boundaries of the institution; the state exclusively regulates the terms and conditions of participation in the institution, provides incentives for participants in the institution, and exclusively regulates the terms and conditions of the termination of participation in the institution.

The state's historic power to regulate marriage is exercised in many particulars; not only do states "prohibit marriage between persons of the same sex, between persons in certain relationships of consanguinity and affinity, and between persons where one has a living spouse," but states also regulate marriage by imposing age and blood testing requirements. Courts have only infrequently inhibited the range of a state's authority to restrict marriage, as in the belated condemnation of miscegenation laws. Nevertheless, a few lesbians and gay men have litigated marriage issues.

There are only a few cases in which same-sex couples have litigated for the right to secure a marriage license and a handful of others in which a claim

103. See, e.g., Maynard, 125 U.S. at 205 (legislature prescribes all parameters of marriage, including age, procedure, duties, property rights, and dissolution).

104. There are substantial legal and economic benefits that inure to those who are married, including: tax exemptions, social security benefits, preferred immigration status, tort recovery for wrongful death, recovery based on loss of consortium, ease of adopting children, state protection in inheritance laws regulating intestate succession (as well as mandatory elective share of estate for survivor), coverage by employee and other health insurance, lowered rates for insurance including automobile insurance, community property rights, spousal privilege for testifying, and housing and zoning regulations requiring particular family relationships. See, e.g., Ohio Rev. Code Ann. § 3105.01 (Anderson Supp. 1989) (court may grant divorce on several grounds: adultery, extreme cruelty, and fraudulent contract); R.I. Gen. Laws § 15-3-3.1 (1988) (court may grant divorce on grounds of irreconcilable differences, without alleging fault of either party); Wash. Rev. Code Ann. § 26.09.020 (Supp. 1990) (divorce petition must set forth date and place of marriage, names and ages of children; must complete certificate and file with petition).

105. See supra note 102, at 34.


relating to whether a relationship constituted "marriage" was raised.110 In the cases where the courts have uniformly rejected any recognition of marital status.111

In many cases, the claims of same-sex couples seeking to obtain legal recognition of their relationship have been rejected summarily by courts in decisions that contain little constitutional analysis and often involve circular reasoning.112 While legal commentators have increasingly expounded on the necessity for recognizing same-sex marriage,113 and have produced elaborate constitutional ra-


111. Courts treat transsexuals more favorably, however. See generally M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (App. Div.) (transsexual, born with physical characteristics of male but who went through successful sex reassignment surgery, termed female person for marital purposes and subsequent marriage to male was not void), cert. denied, 71 N.J. 345, 364 A.2d 1076 (1976).

112. See Jones, 501 S.W.2d at 588. In Jones, the court based its rejection of petitioner's request for a marriage license on little more than the fact that the dictionary definition of marriage stated that it involved members of the opposite sex. The court concluded that "[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." Id. at 590. See also Singer, 11 Wash. App. at 261, 522 P.2d at 1196 (appellants not denied marriage license because of their sex; rather, marriage license denied because of nature of marriage itself); Anonymous, 325 N.Y.S.2d at 500 (court explained "marriage is and always has been a contract between a man and a woman").

113. See Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 BERK. WOMEN'S L.J. 134, 136-37 (1988) (laws that deny same-sex couples right to marry interferes with individual rights; cannot withstand judicial scrutiny); Ingram, supra note 102, at 35 (it is to recognize same-sex marriages); Lewis, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783, 1802 (1988) (traditional definition of marriage must change to render the fundamental right to marry truly effective for all individuals regardless of sexual orientation); Rivera, Queer Law: Sexual Orientation Law in the Mid-Eighties Part I, 10 U. DAYTON L. REV. 459, 540 (1985) (withholding legal recognition of gay relationships denies intimate companionship to gays); Rivera, Queer Law: Sexual Orientation Law in the Mid-Eighties Part II, 11 U. DAYTON L. REV. 275, 324-25, 373, 398 (1986) [hereinafter Rivera, Queer Law Part II] (failure to recognize same-sex marriages prohibits some from receiving financial and legal benefits); Rivera, supra note 53, at 878 (homosexual couples will continue to seek inclusion under marriage laws or through legislation granting same financial and legal benefits as married heterosexuals); Schwarzchild, Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly, 4 BERK. WOMEN'S L.J. 94, 98 (1988) (systematic denial by courts of claims of same-sex couples to marital privacy is anomaly given society's fundamental interest in maintaining the institution of marriage); Note, Marriage: Homosexual Couples Need Not Apply, 23 NEW ENG. L. REV. 515, 546 (1988) [hereinafter Note, Marriage] (same-sex couples will not be "authentic" if legal system evades reality of existence of same-sex lovers that are families); Note, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. PA. L. REV. 193, 193 (1976) [hereinafter Note, Homosexuals' Right to Marry] (states must afford homosexuals opportunity to marry); Note, The Legality of Homosexual Marriage, 82 YALE L.J. 573, 573 (1973)
tionales to justify their positions, courts have remained unimpressed with such arguments and have rejected constitutional challenges to the state’s refusal to recognize same-sex marriages. For example, the courts have rejected the argument that restricting marriage to members of the opposite sex is irrational and/or discriminatory. Courts have also refused to define marriage as a fundamental right requiring the strict standard of judicial scrutiny that the Supreme Court announced in Loving v. Virginia. Likewise, courts have refused to find

(denial of marriage license to homosexual couples violates equal protection clause of fourteenth amendment).


Petitioners contend, second, that Minn. St. c. 517, so interpreted, is unconstitutional.
There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.

_id_ at 312, 191 N.W.2d at 186. _See also_ Friedman, _supra_ note 113, at 152 (right to family, marriage, and procreation shared by same-sex couples clearly fall under fourteenth amendment protection of fundamental rights); Ingram, _supra_ note 102, at 39 (statutes regulating marriage challenged on basis of equal protection or due process of laws); Note, _Marriage, supra_ note 113, at 527 (both constitutional and constitutional arguments for same-sex marriages rejected); Note, _Homosexual’s Right to Marry, supra_ note 113, at 193 (under equal protection analysis, homosexual couples in exclusive, long-term relationships are similarly situated to committed heterosexual couples); Note, _The Legality of Homosexual Marriage, supra_ note 113, at 573 (denial of marriage licenses to homosexual couples violates equal protection clause of fourteenth amendment).

115. _See Baker, 291 Minn. at 313-14, 191 N.W.2d at 187._ The court stated:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state’s classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such a condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that “abstract symmetry” is not demanded by the Fourteenth Amendment.

_id_.

116. 388 U.S. 1 (1967). In _Loving_, the Court stated:

_Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so insupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations._

_id_. at 12 (citations omitted). After quoting the above language from _Loving_, the court in _Baker_ held: _Loving_ does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.
lesbianism or homosexuality a suspect classification. Claims of sex discrimination have failed both under the federal Constitution and under a state equal rights amendment. Appeals to the constitutional rights of association and free exercise of religion also have been summarily dismissed. Finally, a recent challenge to an ordinance prohibiting "sexual orientation discrimination" has been unsuccessful.

The state-sanctioned procedure of adoption, which has been used as a "quasi-marital vehicle," temporarily enjoyed limited success for lesbian and gay couples seeking to define themselves within the legal rubric of "family." Adoption of one adult by another—as distinguished from the adoption of a child by an adult—is an anomaly because adoption is premised on the reproduction of a parent-child relationship. Many state statutes allow limited adult adoptions that require circumstances correlated to a parent-child relationship. Where the statute itself is not restrictive, courts may interpret the statute as restricting a lesbian from adopting her partner. For example, in New York, although a family court and an appellate court allowed the adult adoption of one gay man by

291 Minn. at 315, 191 N.W.2d at 187 (emphasis supplied).

Id. Pertinent portions of the Singer opinion stated: "As we have already held in connection with our discussion of the ERA, however, appellants do not present a case of sexual discrimination. Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the marriage itself." Id.

See Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) in which the court stated: Baker v. Nelson considered many of the constitutional issues raised by the appellants here and decided them adversely to appellants. In our view, however, no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.

In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

Id.


See, e.g., CAL. CIV. CODE § 222 (West 1982) (adopter must be at least ten years younger than adopter); CONN. GEN. STAT. ANN. §§ 45-67 (West Supp. 1989) (adopter must be younger than adopter); FLA. STAT. § 63.042(3) (1989) (homosexuals not eligible to adopt); IDAHO CODE § 16-1501 (1979) (adults may be adopted only if would have been adopted as minors but for inadvertence, mistake or neglect); N.J. STAT. ANN. § 2A:22-2 (Supp. 1983-84) (adopter must be at least ten years younger than adopter); OHIO REV. CODE ANN. § 3107.02 (Page 1989) (adult may be adopted only if permanently disabled, mentally retarded or if child-foster parent or child-stepparent relationship established while adoptee was minor); VA. CODE ANN. § 63.1-222 (Supp. 1989) (adult adoptee must have resided with adopter for at least three months before adoptee's eighteenth birthday).
another,123 the highest court later declined to interpret the adoption statute to "permit one lover, homosexual or heterosexual, to adopt the other and enjoy the sanction of law on their feigned union as parent and child."124 Thus, adoption between lesbian couples is apparently not currently judicially feasible absent spe-

123. See Anonymous I, 106 Misc. 2d at 797, 435 N.Y.S.2d at 530 (statutory definition of adoption proceeding broad enough to encompass legal relationship parties here seek to create). The court addressed the issue of whether it properly could refuse to grant an adoption between two consenting adults who have a homosexual relationship. Id. It held that the "best interests of the child" standard, applicable in adoption of minors cases, was not applicable in cases involving consenting adults. Id. at 800, 435 N.Y.S.2d at 531. The court also noted that it did not wish to allow the adoption statute to shield homosexuality, nor did it wish to appear to approve of or encourage homosexuality. Id. at 792-93, 435 N.Y.S.2d at 527. Nevertheless, the adoption petition was granted and the court stated that "there are no public policy or public morality considerations which operate as a bar to [this] adoption." Id. at 800, 435 N.Y.S.2d at 531. Much of the court's reasoning stemmed from a New York case in which sodomy was decriminalized and which the court depicted as dispositive of the public policy and public morality issues surrounding the instant adoption petition. Id. at 799, 435 N.Y.S.2d at 531 (criminalization of consensual sodomy between persons not married violates privacy and equal protection notions) (citing People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (N.Y. 1980)), cert. denied, 451 U.S. 987 (1981).

A New York appellate court followed the reasoning of the Anonymous I court a year after that decision was written. See In re Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (N.Y. App. Div. 1982) [hereinafter Anonymous II] (homosexual's petition to adopt lover nine years older granted). In reversing a lower court's dismissal of the petition of an adult male to adopt his male lover, the court stated:

Historically, more frequently than not, adoption has served as a legal mechanism for achieving economic, political and social objectives rather than the stereotype parent-child relationship. Adoption is often utilized by adults for strictly economic purposes, especially inheritance. Other considerations include insurance, tax impact and in this case, the apartment. Such a material concern is one of sober life reality and should not be regarded by the court as a cynical device to evade the strictures of the parties' leases or the policy of the adoption law.

Id. at 33, 452 N.Y.S.2d at 200 (citations omitted). In specifically addressing the issue of the parties' relationship, the court reasoned:

The "nuclear family" arrangement is no longer the only model of family life in America. The realities of present day urban life allow many different types of nontraditional families. The statutes involved do not permit this Court to deny a petition for adoption on the basis of this court's view of what is the nature of a family. In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person. Certainly that is present in the instant case.

Id. at 35, 452 N.Y.S.2d at 201.

124. In re Adoption of Robert Paul P., 63 N.Y.2d 233, 238, 471 N.E.2d 424, 427, 481 N.Y.S.2d 652, 655 (N.Y. 1984) (legislature, not court, must change adoption laws to allow lovers to create nonmaritinal legal relationship). The court, quoting from the dissenting opinion in Anonymous II, labeled adoption in the case of lovers a "cynical distortion of the function of adoption." Id. at 238, 471 N.E.2d at 427, 481 N.Y.S.2d at 655 (quoting Anonymous II, 88 A.D.2d at 38, 452 N.Y.S.2d at 203 (Sullivan J., dissenting)). The court noted that although the New York statute was broad, the adoption statute embodies the fundamental social concept that the relationship of parent and child may be established by operation of law. Despite the absence of any blood ties, in the eyes of the law an adopted child becomes "the natural child of the adopted parent" with all the attendant personal and proprietary incidents to that relationship. Indeed, the adoption laws of New York, as well as those of most of the States, reflect the general acceptance of the ancient principle of adoptio naturam imitatur—i.e., adoption imitates nature, which
cial circumstances indicating a parent-child relationship.\(^{125}\)

Other litigation strategies through which lesbians seek recognition of quasi-marital status have included the pursuit of specific spousal benefits such as worker compensation survivor benefits\(^{126}\) and occupancy rights to a rent controlled apartment.\(^{127}\) These strategies seek to include the lovers within the definitions of "member of household" or "member of family."\(^{128}\) The expansive

originated in Roman jurisprudence, which, in turn, served as a guide for the development of adoption statutes in this country.

In imitating nature, adoption in New York, as explicitly defined in section 110 of the Domestic Relations Law, is "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent." It is plainly not a quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual. Moreover, any such sexual intimacy is utterly repugnant to the relationship between child and parent in our society, and only a patently incongruous application of our adoption laws—wholly inconsistent with the underlying public policy of providing a parent-child relationship for the welfare of the child—would permit the employment of adoption as the legal formalization of an adult relationship between sexual partners under the guise of parent and child.

*Id.* at 236, 471 N.E.2d at 425-26, 481 N.Y.S.2d at 653-54 (citations omitted).

125. *See Achtenberg, supra* note 34, at § 1.05 (exploration of recent cases in which adoption denied to adult homosexual couples); Rivera, *Queer Law Part II, supra* note 113, at 379-80 n.84 (Ohio adult nonadoption rule excepted, *inter alia*, where child-foster parent or child-stepparent relationship established when adoptee minor); *Note, Property Rights of Same Sex Couples: Toward a New Definition of Family, 26 J. Fam. L. 357*, 363 (1987-88) (marriage and adoption laws construed as precluding gay couples from their scope).


128. *See Note, Donovan v. County of Los Angeles and State Compensation Insurance Fund: California's Recognition of Homosexuals' Dependency Status in Actions For Worker's Compensation Death Benefits, 12 J. Contemp. L. 151, 153-54, 156 & n.23 (1986)* (good faith dependency test is whether claimant member of deceased's household and whether actually was supported during that period) (citing Donovan, 73 Cal. Comp. Cases (Workers' Comp. App. Bd. Nov. 3, 1983) (California Worker's Compensation Appeals Board (WCAB) held that homosexual relationship can satisfy the "good faith membership of the household" requirement for establishing dependency in an action to collect worker's compensation benefits); Donovan v. County of Los Angeles & State Compensation Ins. Fund, 73 Cal. Comp. Cases (Workers Comp. App. Bd. Jan. 24, 1984) (WCAB stated it was "not persuaded that the inability to enter a recognized marriage should be controlling on whether a person is a good faith member of the household.").) *Id.*

In Braschi, the New York Court of Appeals held that Miguel Braschi was not excluded as a matter of law from seeking non-eviction protection through a regulation that ensured that landlords, upon the death of a rent-control tenant, would not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant." *Braschi*, 74 N.Y.2d at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785. The court interpreted the word "family" expansively:

Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon evic-
nion of household and family advanced in such cases, however, is ex post facto. While the existence of a marriage or adoption may have alleviated the problem of the surviving partner, the couple has nevertheless been sundered by the death. Thus, had marital or quasi-marital legal status been operative, these post-mortem strategies would have been unnecessary.

In the legislative area, attempts to gain legal recognition of lesbian and gay partnerships generally have not been focused on expanding the notions of family and household, but have been focused on recognizing marriage and a form of quasi-marriage, domestic partnership. Domestic partnership legislation has succeeded in only a few cities and recently was defeated in a San Francisco referendum. The San Francisco ordinance would have required that those who wish to participate in domestic partnerships, and who met the eligibility requirements, register with the city of San Francisco. The material benefits

tion. This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death.

Id. at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789 (citations omitted). Braschi has since been extended in other contexts. N.Y.L.J., Sept. 18, 1989, at 25, col. 1 (reporting Athineos v. Thayer which extends Braschi to unadopted orphan); N.Y.L.J., Aug. 30, 1989, at 21, col. 6 (reporting 2-4 Realty Ass'n v. Pittman, which extends Braschi to homosexual partners and parent of partner who also cohabitated with partners).

129. Thus, like wills and testamentary documents, these litigation approaches are more in the nature of tools. See supra notes 63-64 and accompanying text for a discussion of the benefits afforded to lesbians by the calculated employment of such tools.

130. However, the New York State Division of Housing and Community Renewal codified Braschi in the form of emergency amendments after the decision. These amendments have been challenged in an action in trial court by an association of landlords.

131. See San Francisco Bay Times, Sept. 1989, at 10, col. 1 (California bar association poised to vote on recommending legalizing same-sex marriage); Stoddard, Why Gay People Should Seek the Right to Marry, 6 OUTLOOK 9 (1989) (marriage is political issue that most fully tests dedication of non gays to full equality for gays, and also issue most likely to lead to world free of discrimination against lesbians and gay men).

The conference of the delegates of the state bar of California adopted a resolution (Resolution 3-8) recommending that the state legislature amend the marriage statute to be “neutral as to sex.” 7 Bay Area Lawyers for Individual Freedom Newsletter No. 7, 1 (October 1989) The resolution, which would replace the words “between a man and a woman” with “between two people” provided:

MARRIAGES: NEUTRAL AS TO SEX RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Civil Code section 4100 to read: Marriage is a personal relation arising out of a civil contract between two people, to which consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage, it must be followed by the issuance of a license and solemnization as authorized by this code, except as provided by Section 4213.

Id.

See also, Developments, Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1628 (1989) (“Courts and legislatures should legalize same-sex marriage”).


133. San Francisco, Cal. Ordinance 216-89 (Nov. 7, 1989) (rejected by voters under “Proposition S”). The proposed ordinance required that the parties be over 18 years old, live together, share “basic living expenses”, and sign a declaration of domestic partnership to be filed with the city.
under the proposed ordinance were limited; they consisted of only the right to hospital visitation and the extension of bereavement leave to city workers.

While marriage and the quasi-marriage relationships contemplated by adoption and domestic partnership have many practical benefits,\(^\text{134}\) as well as practical disadvantages,\(^\text{135}\) marriage and quasi-marriage are suspect in lesbian legal theory. Underlying the lesbian critique of marriage is the gendered perspective on marriage developed by feminists. For example, feminist historian Gerda Lerner grounds current feminist antagonism toward marriage in an analysis of marriage as a transaction in which women are the objects of contractual relations:

The customary right of male family members (fathers, brother, uncles) to exchange female family members in marriage antedated the development of the patriarchal family and was one of the factors leading to its ascendancy.

\[\ldots\]

The first gender-defined social role for women was to be those who were exchanged in marriage transactions. The obverse gender role for men was to be those who did the exchanging or who defined the terms of the exchanges.\(^\text{136}\)

Marriage has remained interwoven with both the development and the perpetuation of patriarchy and women's status within patriarchy. In the common law of England, the wife's identity merged into that of the husband,\(^\text{137}\) a status which continued until passages of the Married Women's Property Acts during the 1840's and afterwards.\(^\text{138}\) With the rights of women so rigidly curtailed by marriage, it is not surprising that the early anarchist/feminist Emma Goldman proclaimed that marriage condemned women "to lifelong dependency, to para-

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134. See supra note 104 for a list of some of the legal benefits of marriage.

135. The disadvantages of marriage or quasi-marriage relationships might include financial responsibilities for debts incurred, possibility of continuing financial support obligations after terminating the relationship, tax disadvantages for couples whose earnings are substantially the same, the inability to terminate the relationship without state intervention, and heightened difficulty in obtaining public assistance.


137. See Weitzman, supra note 82, at 1172:

By marriage, the husband and wife are one person in law . . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything.

\[\ldots\]

[A] married woman lost control of her real property as well as ownership of her chattels. She could not make a contract in her own name, either with her husband or with third parties, and she could neither sue or be sued in her own name. If she worked, her husband was entitled to her wages, and if she and her husband were to separate, her husband invariably would gain custody of the children.

Id. (quoting 1 W. BLACKSTONE, COMMENTARIES *442).

138. Id. See also supra note 82 for a further discussion of the Married Women's Property Acts.
sitism, [and] to complete uselessness individual as well as social." 139

During the second wave of feminism that began in the late 1960's, many feminists focused on marriage. A typical legal commentary suggested that contemporary marriage continued to reflect the practices of English common law:

Private practices within marriage may not always conform to this traditional "contract" but it is clear that present statutory and case law continue to uphold these traditional obligations of husband and wife.

The essential provisions of this traditional marriage contract recognize the husband as head of the household, hold the husband responsible for support, and hold the wife responsible for domestic and child-care services. Each of these provisions is rooted in common law and each remains alive and well in 1974. It will be argued however, that their endurance is anachronistic, their burdens unconstitutional. The weight of these burdens falls most heavily on women and each should and will face an increasing number of challenges in the near future. 140

Feminist scholar Kathleen Barry explicitly linked marriage and prostitution. 141 More recently, feminist theorists such as Carole Pateman have engaged in sophisticated attempts to link sexual and contract theories. Pateman states: "An exploration of contracts about property in the person to which women must be a party—the marriage contract, the prostitution contract and the surrogacy contract—show that the body of woman is precisely what is at issue in the contract." 142

While incorporating and building on feminist critiques of the institution of marriage, lesbian theory is characterized by an expanded and uniquely lesbian analysis of the problems generated by marriage. Lesbian theorist Monique Wittig, for example, postulates that lesbianism can give people a unique perspective on marriage in stating: "Lesbianism is the culture through which we can politically question heterosexual society on its sexual categories, on the meaning of its institutions of domination in general, and in particular on the meaning of that institution of personal dependence, marriage, imposed on women". 143

140. Weitzman, supra note 82, at 1173.
141. See K. BARRY, FEMALE SEXUAL SLAVERY 271 (1971). Barry writes:

Marriage and prostitution are experiences of individuals but they are also institutions. They are in fact the primary institutions through which sex is conveyed and in which female sexual slavery is practiced. Sex is purchased through prostitution and legally acquired through marriage; in both as well as outside each it may be seized by force.

... Marriage as an institution of legalized love, presumes sex as a duty, a wife's responsibility. Regardless of the mutuality of feeling that may exist when two people enter marriage it is often the case that after the original relationship breaks down, men still assume sex as their automatic right.

Id.

142. C. PATEMAN, supra note 75, at 224.
143. Wittig, Paradigm, in HOMOSEXUALITIES AND FRENCH LITERATURE 114, 118 (Stambolin & Marks ed. 1979).
The possibility of lesbian marriage challenges the characterization of marriage as a relentlessly heterosexual institution. Yet lesbian theory has not necessarily abandoned the categorization of marriage as heterosexual. For example, lesbian attorney Paula Ettelbrick rejects marriage as an appropriate ambition for lesbians:

[M]arriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation. . . .

. . . .

[G]ay marriage instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context. . . . The only legitimate gay sex would be that which is cloaked in and regulated by marriage.144

Joan Nestle extends Ettelbrick's argument about lesbian sexuality by suggesting that the lesbian community's attempt to "sanitize" the appearance of their relationships in public has hurt the causes of both gay men and lesbians.145 In addition, the prospect of lesbian marriage is detrimental because it creates a two-tier system of "good" and "bad" lesbians that elevates married lesbian couples over other varieties of lesbian relationships.146 Ettelbrick's argument points to the irony of lesbians pursuing the right to marry, when that right is the right of the state to control, regulate, and dominate the marriage relationship. The exercise of that right is especially ironic considering the state's current and historic power to criminalize lesbian sexuality, a power that is often exercised.147 While it has been suggested that the "practical, political and philosophical" rewards of the right to marry are worth the state intrusions,148 the price of state recognition of lesbian marriage is excessive from the perspective of lesbian legal theory.

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144. Ettelbrick, Since When is Marriage a Path to Liberation?, 6 OUTLOOK 9, 14, 16 (1989).
145. Nestle states:
In these painful and challenging times, we must not run out on gay men and leave them holding the sexuality bag. It is tempting to some Lesbians to see themselves as the clean sexual deviant, to disassociate themselves from public sexual activity, multiple partners, and intergenerational sex. While this may be the choice for some of us, it is not the reality of many others, not now and not in the past. Lesbian purity, a public image that drapes us in the cloak of monogamous long-term relationships, discrete at-home social gatherings and a basic urge to re-create the family, helps no one . . . .

. . . .

[B]y allowing ourselves to be portrayed as the good deviant, the respectable deviant, we lose more than we will ever gain. We lose the complexity of our own lives, and we lose what for me has been a lifelong lesson; you do not betray your comrades when the scapegoating begins.

146. Ettelbrick, supra note 144, at 17.
148. Stoddard, supra note 131, at 10-13 (inheritance and other property rights, politico-institutional recognition, and personal symbolic benefits would inure to marrieds).
Pursuing state approval of relationships also forces lesbian partners into potentially damaging attempts to calibrate their lives to conform to heterosexual models. Several lesbian theorists have explored the damaging nature of this calibration in the context of lesbian sexual expression. For example, in exploring the phenomenon of the “hetero-relationizing” of female affection,\textsuperscript{149} philosopher Janice Raymond contends that gyn/affection often becomes transmogrified through the use of heterosexual terms that “signify either the presence of illicit heterosexuality (prostitute, whore) or the absence of approved heterosexuality (frigid, old maid)”.\textsuperscript{150} Under Raymond’s perception, the hetero-relationizing of lesbian couples into man/wife dyads appears probable because all women must be defined heterosexually, even if that heterosexuality is a transmogrified farce.\textsuperscript{151}

Similarly, lesbian theorist Marilyn Frye addresses the hazards of the internal hetero-relationizing of lesbian relationships by lesbians in an article entitled \textit{Lesbian “Sex”}.\textsuperscript{152} In commenting on a sociological sex survey that concluded that lesbian couples have sex less often than gay male or heterosexual couples—and the discussion that the study raised in the lesbian communities—Frye asks: “What violence did lesbians do their experience by answering the same question the heterosexuals answered, as though it had the same meaning for them?”\textsuperscript{153} Frye contends that since sex has always been defined as a phallic process demarcated by male ejaculation, lesbians do violence to their experience by attempting to:

[M]old our loving and our passionate carnal intercourse into explosive 8-minute events. That is not the timing and ontology of the lesbian body. When the only thing that counts as “doing it” are those passages of our interactions which closely approximate a paradigm that arose from the meaning of the rising and falling penis, no wonder we discover ourselves to “do it” rather less often than do pairs with one or more penises present.\textsuperscript{154}

Lesbian ethicist Sarah Hoagland has produced the most extensive argument about lesbian relationships. She suggests that lesbians resist hetero-relationizing and depart from heterosexual stereotypes in describing lesbian relationships:

\textsuperscript{149} J. Raymond, A Passion for Friends: Toward a Philosophy of Female Affection (1986) (hetero-relationizing defined as socio-politico-economic relation of women to men as defined by men).

\textsuperscript{150} Id. at 65 (in heterohistory, women defined in terms of men; therefore gyn/affection is no affection and merely is lewd).


\textsuperscript{153} Frye, supra note 152, at 49.

\textsuperscript{154} Id. at 53.
"We need new language and new meaning to develop our lesbian desire." Hoagland implicitly questions not only the propriety of lesbian marriage or quasi-marriage, but also underlying concepts of coupledom. She concludes that by "overlap[ping] the concept of 'friend' and 'lover,' our connections in the community and the community itself will become stronger, particularly through extended relationships." For Hoagland the variety of connections between lesbians is a source of strength and security for lesbian experience. Rigidity of form would serve to stifle both the lesbian relationship and the community.

Lesbian attorney Paula Ettelbrick echoes the sentiments of Raymond, Frye, and Hoagland:

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations . . . . Being queer means pushing the parameters of sex, sexuality, and the family, and in the same process transforming the very fabric of society.

The specter of lesbian marriage and lesbian quasi-marriage thus poses the danger of demarcating acceptable lesbians (married couples) from unacceptable lesbians (unmarried), as well as threatens to hetero-relationize and erase lesbianism. Marriage is an attempt to limit the multiplicity of relationships and the complexities of coupling in the lesbian experience. While it might be argued that the very inclusion of lesbians within the marriage institution will necessarily transform the institution, the necessary corollary to that argument is that the inclusion of lesbians within the marriage institution will transform lesbian relations. The transformation of lesbianism by participation in marriage will not be positive; it will demarcate acceptable lesbian relationships and sexualities from unacceptable ones and it will hetero-relationize lesbianism. Perhaps rather than advocating that marriage be available to lesbians, lesbian legal theory should advance the proposition that marriage should be abolished as a sexist, heterosexist, and narrow institution.

155. S. Hoagland, supra note 12, at 168.
156. Id. at 173.
157. Ettelbrick, supra note 144, at 14 (justice for lesbians and gay men requires societal acceptance of homosexuals' differences, though legal system generally does not support differences).
158. See Stoddard, supra note 131, at 13 (marriage unattractive as currently structured, but enlarging concept to embrace same-sex couples can be means through which institution divests itself of sexist trappings).
159. For arguments from different perspectives advocating the abolishment of marriage, see generally M. Barrett & M. McIntosh, The Anti-Social Family (1982) (socialist-feminist perspective discussed); Goldman, supra note 139 (anarchist perspective discussed).

See also M. Barrett & M. McIntosh, supra, at 144-46 (marriage-like relations challenged as privileging home life); Weinzeig, Should a Feminist Choose a Marriage-Like Relationship?, 1 Hypatia 139 (1986) (coupled relationships analyzed from perspective of achieving feminist goals of equality, freedom, and self-development); Note, A Feminist Justification for the Adoption of an Individual Filing System, 62 S. Cal. L. Rev. 197 (1988) (marriage should not be abolished; economic advantages and disadvantages of marriage should).
CONCLUSION

_a lesbian who does not reinvent the world is a lesbian in the process of disappearing_\(^\text{160}\)

Lesbians—as couples, partners, and lovers—are legal strangers. Lesbians understandably seek to procure the status that is guaranteed “family” members, “blood relations” or “spouses,” to remedy specific disadvantages and forestall tragedies. Lesbian legal theory must consider the legal methods that might assist individual lesbians yet be compatible with a specifically lesbian legal theory. Recognizing that it is impossible for lesbians to insulate themselves from the law does not mandate that lesbians automatically embrace all legal methods.

In analyzing legal approaches to lesbian coupledom, this article has developed a tripartite scheme. First, legal mechanisms such as powers of attorney, trusts and wills, and other “tools” may assist lesbians who find themselves in the legal arena and do not interfere with the lesbian relationship. These “tools” are of a limited nature; they essentially counteract laws and rules that would otherwise operate in favor of blood relations. Second, while contracts may also benefit individual lesbians, the origins and assumptions of contract ideology render relationship contracts questionable. Relationship contracts between lesbians may “colonize” the relationship, especially when such contracts address nonlegal matters. Third, the lesbian pursuit of marriage and quasi-marriage status may also provide specific benefits, but it impermissibly demarcates categories of lesbians and hetero-relationizes lesbian existence.

The tripartite scheme used in this article is intended as an analytic strategy for investigating and evaluating the various options for lesbian lovers. As those of us who have taken up the task further develop lesbian legal theory, these concepts will evolve and change. Lesbian relationships are multifarious, enigmatic, and eclectic. Lesbians need a commensurate lesbian legal theory: this article is but a beginning.

\(^{160}\) N. BROSSARD, _supra_ note 2, at 136.